No. ____

IN THE

Supreme Court of the United States

CENTAURI SHIPPING LTD.,
Petitioner,

V.

WESTERN BULK CARRIERS KS, WESTERN BULK AS,
AND WESTERN BULK CARRIERS AS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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August 28, 2009

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QUESTION PRESENTED

Whether a foreign corporation's registration to conduct business in the State of New York is sufficient, by itself, for it to be "found within the district" under Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, and avoid "maritime attachment"?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here, and appellant below, is Centauri Shipping Ltd.

The appellees below, and respondents here, are Western Bulk Carriers KS, Western Bulk AS, and Western Bulk Carriers AS.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

Centauri Shipping Ltd. is not a publicly held corporation in the United States and there are no corporate parents, subsidiaries, or affiliates of Centauri Shipping Ltd. which are otherwise publicly held in the United States.

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The opinion of the Court of Appeals is reported at 2009 U.S. App. LEXIS 8464, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-3a. The Court of Appeals' decision was based entirely on its prior opinion in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, which is reported at 560 F.3d 127, and which is reprinted at Pet. App. 4a-17a. The Court of Appeals' order denying rehearing and rehearing en banc is unpublished, but reprinted at Pet. App. 47a-48a. The District Court's vacatur of the attachment occurred during a September 7, 2007, hearing which was not reported, but was subsequently memorialized in an Order dated September 12, 2007 ("Vacatur Order"), and discussed in an opinion reported at 528 F. Supp. 2d 186. The Vacatur Order and the subsequent opinion are reprinted at Pet. App. 18a-46a.

JURISDICTION

The Court of Appeals entered its judgment on April 20, 2009. A timely filed petition for rehearing and rehearing en banc was denied on July 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions:

> Rule B. In Personam Actions: Attachment and Garnishment
>
> (1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in

personam action:

> (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.
>
> (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.
>
> (c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that

exigent circumstances existed.

(d) (i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

New York's Business Corporation Law § 1304:

R § 1304. Application for authority; contents

(a) A foreign corporation may apply for authority to do business in this state. An application, entitled "Application for authority of . . .. (name of corporation) under

section 1304 of the Business Corporation Law", shall be signed and [fig 1] delivered to the department of state. It shall set forth:

(1) The name of the foreign corporation.

(2) The fictitious name the corporation agrees to use in this state pursuant to section 1301 of this chapter, if applicable.

(3) The jurisdiction and date of its incorporation.

(4) [fig 1] The purpose or purposes for which it is formed, it being sufficient to state, either alone or with other purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under this chapter, provided that it also state that it is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained. By such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations therein or in this chapter, if any.

(5) The [fig 1] county within this state in which its office is to be located.

(6) A designation of the secretary of state

as its agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him.

(7) If it is to have a registered agent, his name and address within this state and a statement that the registered agent is to be its agent upon whom process against it may be served.

(8) A statement that the foreign corporation has not since its incorporation or since the date its authority to do business in this state was last surrendered, engaged in any activity in this state, except as set forth in paragraph (b) of section 1301 (Authorization of foreign corporations), or in lieu thereof the consent of the state tax commission to the filing of the application, which consent shall be attached thereto.

(b) Attached to the application for authority shall be a certificate by an authorized officer of the jurisdiction of its incorporation that the foreign corporation is an existing corporation. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

New York's Civil Practice Law and Rules Section 301:

> § 301. Jurisdiction over persons, property or status
>
> A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

The pertinent provisions are also reproduced at Pet. App. 49a-56a.

STATEMENT OF THE CASE

The question presented by this case is one of exceptional importance to the global maritime community. At stake is the continued viability of the remedy of maritime attachment, a unique feature of American admiralty practice which permits plaintiffs possessing maritime claims to restrain the property of defendants on the strength of an *ex parte* showing that the defendants cannot be "found within the district."

This vital tool has been rendered useless by the Second Circuit's resort to a state corporate registration statute when determining whether the requirements necessary to obtain a maritime attachment have been met. In so doing, a vast loophole in the remedy has been opened, through which feckless maritime defendants can be rendered

immune from attachment simply by filing sham registrations to do business which permit them to be "found within the district" without having an actual presence.

The danger is clear and real. In the wake of the Second Circuit's decision below, foreign maritime operators are registering to do business in New York in droves. Their objective is to create an effective safe harbor from maritime attachment and avoid the only practical means by which claimants can obtain jurisdiction or security for their claims.

This is a problem of national and international scope and importance. Due to New York's prominence as a center of international funds transfers, decisions impacting the ability of plaintiffs to obtain maritime attachments in New York directly affect their ability to restrain such funds transfers nationally. As a result, the Second Circuit's decisions regarding the scope and requirements of maritime attachment are of critical importance to the global maritime community. Given its preeminence in this area, and the deference given to its decisions in this field by other Circuits, the Second Circuit is in effect, a "Federal Circuit" for maritime attachments. The issues involved, and the consequences flowing from this case are no less important than the patent issues which this Court frequently reviews.

Moreover, this case presents direct conflicts with the traditional historical purposes of maritime attachment as outlined by this Court, as well as the

principles of harmony and uniformity of federal maritime law prescribed by this Court.

Thus, the Court must grant certiorari in order to ensure the preservation of the remedy of maritime attachment and its uniform application, which are essential to the healthy flow of international commerce and to thousands of maritime plaintiffs worldwide who depend on it to obtain security for their claims and jurisdiction over peripatetic maritime defendants.

A. Factual Background

This case began in March of 2005, in Luanda, Angola, when the M/V CENTAURI, a vessel owned by petitioner Centauri Shipping, Ltd. ("Centauri"), was wrongfully arrested by respondent Western Bulk Carriers KS ("WBC"). WBC had arrested the vessel in an attempt to collect on English judgments that it had obtained against a third-party, Navitrans Maritime Inc. Joint Appendix A-80 – A-81.[1] Since the English judgments in question were against a third-party, Centauri challenged the arrest, and in November of 2006, obtained a judgment from the Supreme Court of the Republic of Angola ("Angolan Supreme Court") finding that WBC had wrongfully arrested the vessel.

In fact, the Angolan Supreme Court also subjected WBC to a fine for its "malicious abuse of

[1] All citations to record evidence are to materials in the Joint Appendix ("JA") that was before the Second Circuit.

legal process" finding that WBC had acted in bad faith by intentionally filing misleading documents with the lower court when seeking the arrest of Centauri's vessel. JA A-112. Emboldened by this outcome, Centauri commenced proceedings to recover $14,693,577 in damages for the loss of income (and other expenses) it suffered through having had its vessel under arrest for nearly two years. JA A-180 – A-183. These proceedings remain on-going in Angola.

B. Proceedings Below

In the interim, in order to ensure that it would be able to collect on any judgment it obtained from the Angolan Supreme Court, Centauri filed a maritime attachment action against WBC in the District Court. Pet. App. 22a; JA A-8 – A-15. Centauri's goal was to obtain an Ex Parte Order For Process of Maritime Attachment and Garnishment ("Attachment Order") under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions ("Rule B") that could be served on intermediary banks in the Southern District of New York that process U.S. dollar denominated electronic funds transfers. In this way, Centauri could obtain pre-judgment security for its claims by having these banks restrain any electronic funds transfers being sent to or from WBC.

Obtaining a maritime attachment is a fairly simple procedure. A plaintiff need only file a verified

complaint stating a maritime claim, and support it with an affidavit "stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district." Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions B(1)(b). If, upon review, the verified complaint and affidavit appear to be in order, the court must authorize the issuance of process of attachment and garnishment. *Id.*

Upon obtaining such process of attachment and garnishment, a plaintiff may serve it on any garnishees in the district holding the defendant's tangible or intangible property including – in New York only – electronic funds transfers. Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions B(1)(d). The garnishees, which in the case of electronic funds transfers, are the major intermediary banks located in Manhattan, must subsequently restrain any funds transfers emanating from, or being sent for the benefit of, the defendant, as pre-judgment security for plaintiff's claims.

Importantly, this restraint of property also provides a basis for the court's assertion of *quasi in rem* jurisdiction over the defendant, and in essence, acts to motivate the defendant to appear and answer the plaintiff's claims, or else forfeit the seized property.

The entire procedure is conducted on an *ex parte* basis, although the defendant has the right to a prompt hearing after property has been attached in

order to challenge the basis on which the process of maritime attachment and garnishment was issued or to seek other relief from the attachment. Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions E(4)(f).

Thus, the remedy grants broad power to plaintiffs to assist them in securing and prosecuting their claims, and its exercise is restricted only by the requirement that the defendants not be "found within the district." Despite various permutations in its wording and application over the centuries, this requirement that the defendant not be capable of being "found within the district" has always been

present in Rule B and its predecessors.[2]

The purpose of this presence requirement is plain: to force maritime defendants to either elect to subject themselves to the jurisdiction of the courts of

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[2] *See*, *e.g.*, Francis Clerke, PRAXIS SUPREMAE CURIAE ADMIRALITATIS (1666), translated in John E. Hall, THE PRACTICE AND JURISDICTION OF THE COURT OF ADMIRALTY: IN THREE PARTS, p. 60 (Baltimore 1809) ("if [the defendant] has concealed himself or has absconded from the kingdom, so that he cannot be arrested…"); Arthur Browne, A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY, VOL. II, at p. 434 (2nd ed. 1802) ("suppose that a person … cannot be found, or that he lives in a foreign country: here the ancient proceedings of the admiralty court provided an easy and salutary remedy … [t]he goods of the party were attached to compel his appearance."); R. of Prac. of the Cts. of the U.S. in Causes of Adm. & Mar. Jurisdiction, Rule 2, 44 U.S. (3 How.) at iii (1844) ("suits in personam the mesne process may be by a … warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found to attach his goods and chattels to the amount sued for…"); R. of Prac. for the Cts. of the U.S. in Adm. & Mar. Jurisdiction, Rule 2, 254 U.S. 671 (1920) ("suits in personam the mesne process … the libellant may … pray for … a clause therein to attach his goods and chattels … if said respondent shall not be found within the district."); Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B, 383 U.S. 1071 (1966) ("With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district."); *See generally*, William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1900-1903 (1999).

the district in question through the conduct of business, or run the risk that their property in the district will be attached. By preventing maritime attachment of the property of defendants who were actually present in the district, the remedy is thus saved for use only in cases where there is truly no other means by which a plaintiff can readily obtain redress.

Within a matter of days of obtaining its Attachment Order, Centauri was able to restrain $15,350,796 in electronic funds transfers being sent to or from WBC. Pet. App. 23a; JA A-16 – A-21. In order to free up the attached funds transfers, WBC provided a surety bond as alternate security. Pet. App. 23a; JA A-20 – A-21.

However, subsequently WBC moved to vacate the attachment and dismiss Centauri's action pursuant to Supplemental Rule E(4), on the grounds (in part) that no Attachment Order should have been issued because it could have been "found within the district." Pet. App. 23a; JA A-22 – A-23.

Rule B itself does not define "found within the district."[3] Accordingly, the District Court applied the "two-pronged inquiry" established by the Second Circuit in *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 581-82 (2d Cir. 1963): "First, whether (the respondent) can be found within the district in terms of jurisdiction, and second, if so,

[3] *See* Notes of Advisory Committee to 1966 adoption of Rule B: Note to Subdivision (1).

whether it can be found for service of process."

In essence, under the *Seawind* test a defendant will be deemed to be not "found within the district" unless it can establish that personal jurisdiction can be asserted over it, and it also possesses an agent within the district on whom service of process can be made. The *Seawind* test also requires the application of state law to determine these findings under the *Erie* doctrine.

Under New York case law, a foreign corporation must be engaged in a continuous and systematic course of "doing business" in New York in order to be subject to personal jurisdiction. *See*, *e.g.*, *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533 (1967); NY C.P.L.R. § 301.

WBC conceded that it did not conduct sufficiently continuous and systematic business in New York to be subject to personal jurisdiction under New York's case law, but nevertheless maintained that it could be "found within the district," by virtue of the fact that it had filed an application for authority to conduct business with the New York Department of State's Division of Corporations pursuant to N.Y. Bus. Corp. Law § 1304, and therefore had "consented" to the personal jurisdiction of the courts in New York. This "consent," in conjunction with its appointment of its maritime attorneys as its agent for the service of process in the district, WBC urged, rendered it capable of being "found within the district" and therefore, it should not have been

subject to maritime attachment.

The requirements for a foreign corporation to register to do business in New York are exceedingly low. All that is needed is for the foreign corporation to submit to the Department of State a brief application for authority, along with a copy of a certificate of good standing and payment of a modest fee. N.Y. Bus. Corp. Law § 1304. Within a few business days the foreign corporation will be registered, without having to establish that the foreign corporation actually does, or ever will, conduct any business in New York.

Nevertheless, after the case was reassigned to a different judge, WBC's motion was granted in an oral decision given on the record, and the Attachment Order was vacated. Pet. App. 24a; JA A-235 – A-254. Centauri timely appealed the District Court's decision (pursuant to 28 U.S.C. § 1291) and also moved for a stay of the decision pending the appeal. Pet. App. 24a-25a; JA A-257 – A-259, A-262. Although the District Court initially denied Centauri's request for a stay, Centauri was able to obtain a stay pending appeal from the Second Circuit. Pet. App. 45a-46a; JA A-270, A-272 – A-273.

On March 19, 2009, the Second Circuit, Per Curiam, issued an opinion in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009), in which the same issue had been raised. In the *STX Panocean* opinion, the Second Circuit stated:

> We find that registration with the New York Department of State, pursuant to New York Business Corporation Law § 1304, to conduct business in New York and designation of an agent within the district upon whom process may be served constitutes being "found" within the district for purposes of Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Pet. App. 5a-6a.

This conclusion by the Second Circuit was predicated on its finding that "[i]t is well-settled under New York law that registration under § 1304 subjects foreign companies to personal jurisdiction in New York." Pet. App. 11a-12a.[4]

On April 20, 2009, the Second Circuit issued a Summary Order affirming the District Court's decision, stating that since the issue presented on

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[4] Since deciding *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945), this Court has never directly addressed the issue of whether a foreign corporation's registration to do business, standing alone, would constitute sufficient minimum contacts to permit a state to assert personal jurisdiction over that foreign corporation either. But *see Neirbo Co. v. Bethleham Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (holding that the predecessor to New York's corporate registration statute was constitutional in the limited context of determining whether the statutory designation of an agent for service of process could constitute a waiver of applicable federal statutory venue requirements).

appeal was whether WBC's registration to conduct business in New York pursuant to N.Y. Bus. Corp. Law § 1304 was sufficient for that corporation to be "found within the district" under Rule B(1), thereby defeating attachment of the corporation's property, "[w]e are bound by STX [supra] unless and until its rationale is overruled by the Supreme Court or by this court en banc." Pet. App. 3a.

On May 4, 2009, Centauri timely filed a Petition for Rehearing *En Banc*, which was denied by the Second Circuit in an Order dated July 10, 2009. Pet. App. 47a-48a. On July 17, 2009, Centauri moved to stay the issuance of the mandate by the Second Circuit pending the filing of a petition for writ of certiorari in the Supreme Court. The motion for a stay from the Second Circuit remains pending.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question concerning an essential remedy of American admiralty law: should state law be permitted to supplant federal maritime law in determining whether a defendant can be "found within the district" and therefore, subject to maritime attachment? This question should be, but has not yet been, decided by this Court.

Maritime attachment is an ancient remedy, whose origins are "to be found in the remotest history of the civil as well as of the common law." *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1874). Its durability can be credited to the uniquely

international nature of the maritime industry, and the propensity maritime debtors and tortfeasors had (and continue to have) for evading plaintiffs through the secreting of assets, use of corporate shells, flags of convenience, and offshore tax havens. Through its provision of an expedient means for the restraint of a maritime defendant's property, Rule B attachment facilitates maritime commerce in innumerable ways by encouraging parties to do business with the confidence that a distant debtor can be made to answer and pay a claim.

The remedy of maritime attachment is more important than ever. With the advent and widespread adoption of electronic funds transfer technologies in recent years, maritime attachment has only become more prominent, surpassing vessel arrests to become the chief means by which plaintiffs seek to secure their admiralty claims. This is understandable since it has become exceedingly common for maritime operators today to have little or no fixed assets except for streams of electronic funds transfers.

The confluence of New York's position as a central clearing house for these electronic funds transfers, and the global maritime community's virtually exclusive preference for such funds transfers as a method of payment, has led to the Second Circuit becoming a *de facto* "Federal Circuit" for maritime

attachments.[5]

As a result, the Second Circuit's decisions concerning the meaning and application of Rule B's provisions have almost uniformly been adopted throughout the country. Thus, decisions issued by the Second Circuit which impair the right to obtain maritime attachments, such as the one below, have an immediate and far reaching effect on international maritime commerce.

The Second Circuit's decision below threatens the continued viability of maritime attachment, through its reference to a state corporate registration statute to determine whether a defendant can be "found within the district" for the purposes of Rule B. The resort to state law eviscerates this most quintessential of maritime remedies because it drastically lowers the requirements defendants must meet to obtain immunity from maritime attachment.

In essence, it creates a loophole, which is rapidly being exploited, whereby maritime operators

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[5] *See*, *e.g.*, *Anchor Marine Transp. Ltd. v. Lonestar 203*, 2009 U.S. Dist. LEXIS 29281, at *4 n.1 (W.D. La. Mar. 18, 2009) (applying non-binding Second Circuit law because of "long history of maritime attachments in the courts of the Second Circuit due to the commercial importance of the ports of New York"); Ian Taylor, Note, *The Final Chapter? The Second Circuit Once Again Addresses Rule B Attachments of Electronic Fund Transfers in Consub Delaware LLC v. Schahin Engenharia Limitada*, 33 TUL. MAR. L. J. 575, 586-86 (2009) (observing that "cases involving Rule B attachments on EFTs are unique to the Second Circuit, and even more specifically, to the Southern District of New York.")

throughout the world – regardless of their lack of any actual connections with New York – can render their international funds transfers immune from attachment simply by filing sham registrations to do business in New York and appointing a statutory agent for the service of process in Manhattan.

This is a clear subversion of the original purpose of the presence requirement for maritime attachments, which was to confront maritime defendants with the option of either subjecting themselves to the jurisdiction of the courts of the district in question through the conduct of business, or to make themselves vulnerable to the possibility that their property in the district would be attached. By giving defendants an easy escape from this dilemma, the Second Circuit has effectively neutered the ability of plaintiffs worldwide to attach electronic funds transfers, and thus, obtain security and jurisdiction for their maritime claims.

Thus, the Second Circuit's decision flies in the face of prior decisions of this Court recognizing the importance of maritime attachment and its vital historical purposes. *See*, *e.g.*, *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 490 (1825); *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874); *In re Louisville Underwriters*, 134 U.S. 488, 490 (1890); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 693, 698 (1950).

Further, by relying on state law, the Second Circuit's decision is in conflict with this Court's long

line of precedent concerning the invalidity of state legislation which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917).

Allowing incompatible state corporate registration statutes to play a role in determining whether the requirements for obtaining a maritime attachment have been met would subject the maritime industry to multiple standards making it commercially burdensome for maritime commerce to operate efficiently. This federal interest in maintaining the uniformity and harmony of maritime law supplants any conflicting state interest, especially since the Constitution allocates substantive and procedural admiralty law to federal, not state, control, and the Supplemental Admiralty Rules represent a federal enactment defining the unique procedures applicable in cases that fall within admiralty jurisdiction.

Thus, the Court must grant certiorari to fashion a rule consistent with the historical purpose and role of maritime procedural rules, and to prevent the default to inapplicable and potentially inconsistent state law that would disrupt the uniformity necessary to the smooth functioning of maritime commerce.

I. THIS CASE RAISES ISSUES OF NATIONAL AND INTERNATIONAL IMPORTANCE AND SCOPE

Historically, maritime operators were a shifty sort, prone to hiding assets, evading judgments, and registering their corporate shells and vessels in unfriendly and secretive offshore jurisdictions. *Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co.*, 743 F.2d 956, 961 (1st Cir. 1984) (noting that "the [maritime] creditor … may more often be the one in need of special protections.") Little has changed today. *See Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543, 1548 (11th Cir. 1984) (noting that "Merchants were long ago described as 'shrewd, careful, familiar with the forms of business ... watchful [of] their own interests'" and "[l]ittle has changed today.")

In fact, due to the development and wholesale adoption of electronic funds transfer technologies in recent years by the international maritime community, the situation faced by maritime plaintiffs is probably worse than it has ever been. The spread of these technologies is such that virtually all payments in maritime commerce made today are effected by international funds transfers. *Winter Storm Shipping v. TPI*, 310 F.3d 263, 273 (2d Cir. 2002) (noting that "[t]he use of EFTs, product of the modern electronic age, is widespread in international trade.") This ability to easily and instantly transfer assets from one jurisdiction to another has only heightened the tendencies of

maritime operators to shirk legal responsibility. *See*, *e.g.*, *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982) (observing that "[i]n this electronic age, freights owing to a charterer … can be transferred instanter … to a non-maritime haven.")

As a result, today many maritime operators are virtually judgment proof, with their beneficial owners hidden behind a Matryoshka doll of corporate shells, registered in jurisdictions that are unfriendly to creditors, and possessing no assets but a transient stream of electronic funds transfers. *See*, *e.g.*, *Inter-American Shipping Enterprises, Ltd. v. Turbine Tanker TULA*, 1982 AMC 951 (E.D.Va. 1981) (describing the corporate shells used by maritime debtors to disguise shipping assets and the difficulties of a recovery in the face of such measures).

With such odds stacked against them, plaintiffs are loath to pursue claims against maritime defendants absent some reassurance that there will be assets against which a judgment or award can be enforced. Thus, the use of devices such as vessel arrests and maritime attachments is vital to preserving the rights of plaintiffs to pursue their claims and obtain meaningful relief.

Due to technical requirements and certain banking regulations, as well as New York's status as one of the financial and trade capitals of the world, virtually all of the U.S. denominated electronic funds

transfers being sent worldwide pass through intermediary banks located in Manhattan as part of their processing en route to their final destination.[6]

Therefore, since Rule B only permits the attachment of property located within the district in which the remedy is sought, the only effective forum for a plaintiff seeking to attach U.S. dollar denominated electronic funds transfers is the United States District Court for the Southern District of New York. As a result of this unusual situation, the Southern District of New York has been virtually inundated with a flood a maritime attachment proceedings, and by far, leads the nation in such

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[6] *See Winter Storm*, 310 F.3d at 273 (citing *Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985) for the proposition that "Banking networks serving global commerce tend to use intermediary banks in the world's financial capitals such as New York" ... "Often, when a person in one foreign country makes a payment in U.S. dollars to someone in another foreign country, the payment clears through New York."); *Swiss Marine Servs. S.A. v. Louis Dreyfus Energy Servs. L.P.*, 598 F. Supp. 2d 414, 415 (S.D.N.Y. 2008) (noting that "[b]ecause banking networks handling international commerce tend to use intermediary banks, and New York is a global financial capital, many of the EFTs pass through banks in [the Southern District of New York].")

filings by a wide margin. [7]

Given its role as a gatekeeper to the attachment of electronic funds transfers, the Southern District of New York is of extreme importance to maritime plaintiffs worldwide. Imagine a vessel owner seeking to recover against a charterer who breached the terms of the charter. Absent the ability to restrain the charterer's electronic funds transfers, and the likely absence of any other locatable assets, the owner will likely never be able to recover on its claims, and cognizant of that fact, the charterer will feel free to breach the charter party at will. The situation just described occurs all too frequently and will only continue to worsen as maritime operators flock to New York to file sham registrations.

However, the national character of the issues raised by this case are not limited to the Southern District of New York's unusual position. Even before the advent of electronic funds transfers, decisions issued by the Second Circuit regarding the application of Rule B were almost universally adopted throughout the nation. For example, all of

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[7] For example, according to one researcher, between October 1, 2008, and January 31, 2009, nearly 1,000 maritime attachment proceedings (seeking to attach an estimated $1.35 billion in the aggregate) were filed in the Southern District of New York, constituting approximately one-third of all civil lawsuits filed in that district. *See Amicus Curiae* brief submitted by The Clearing House Association L.L.C. in *Consub Del. LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), at pp. 3-4.

the Courts of Appeals which have considered the issue, have essentially adopted the Second Circuit's *Seawind* test for determining when a defendant cannot be "found within the district." [8]

Thus, due to its prominence, the Second Circuit's decisions regarding Rule B, such as the one below, will have a strong national impact on maritime commerce which must be addressed by this Court in order to ensure the unfettered flow of international trade.

II. THE DECISION BELOW IS IN SUBSTANTIAL TENSION WITH THIS COURT'S PRIOR DECISIONS

This Court has never delineated precisely how the presence requirement of the remedy of maritime attachment should be evaluated, and furthermore, has not heard a case involving maritime attachment in over fifty years. Thus, there is no direct conflict between the holding of the Second Circuit below and

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[8] *See*, *e.g.*, *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997) (adopting the immediate predecessor to the *Seawind* test); *La Banca v. Ostermunchner*, 664 F.2d 65, 67-68 (5th Cir. 1981) (adopting *Seawind* test); *Oregon by State Highway Comm'n v. Tug Go Getter*, 398 F.2d 873, 874 (9th Cir. 1968) (same); *Maritrans Operating Partners L.P. v. M/V Balsa 37*, 64 F.3d 150, 153-154 (4th Cir. 1995), *cert. denied*, 516 U.S. 1073 (1996) (interpreting a local admiralty rule which specifically provided that "[a] defendant is considered to be 'not found within the district' if, in an action in personam, the defendant cannot be served with the summons and complaint as provided in Federal Rule 4(d).")

this Court's prior decisions.

However, there is a palpable tension between the results created by the Second Circuit's decision and the general respect and deference granted by this Court to the traditional historical purposes of maritime attachment.

Further, the Second Circuit's reference to state law and state statutes in determining the boundaries of a federal admiralty rule, places it at odds with the principles stated by this Court favoring uniformity and harmony in the application of federal maritime law.

Due to the national and international interests implicated by the Second Circuit's decision, this Court should grant certiorari to address these important issues.

A. There is a Conflict With the Traditional Historical Purposes of Maritime Attachment

It has long been recognized that maritime attachment is one of the most distinguishing features of American admiralty practice. This Court has noted that use of maritime attachment by admiralty courts "has prevailed during a period extending as far back as the authentic history of those tribunals can be traced." *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874); *see also In re Louisville Underwriters*, 134 U.S. 488, 490 (1890) (observing that maritime attachment "has been recognized and upheld by the rules and decisions of this court" as

well as by "the ancient and settled practice of courts of admiralty"); *see generally*, Matthew P. Harrington, *ARTICLE: The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 350-51 (1996).

Its necessity and utility for the smooth functioning of maritime commerce have also been praised. *See*, *e.g.*, *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 490 (1825) (stating of "the practice of issuing attachments" that "it has the highest sanction also, as well in principle as convenience"); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 698 (1950) ("[t]he importance of the right to proceed by attachment to afford security has been emphasized"); *Schiffahartsgesellschaft*, 732 F.2d at 1548 (noting that maritime attachment "commands a speedy clarification of vital facts underlying both prior disputes and the current seizure" and "compels adjudication" and remarking that the absence of the remedy "would in many cases amount to a denial of justice.")

In reaching its decision in *STX Panocean*, the Second Circuit explicitly rejected this Court's recognition of the special needs of maritime plaintiffs. In fact, the Second Circuit perversely justified its holding by explaining that: "[i]n the modern era, although maritime commerce is still international and maritime assets are still transitory, companies that have both appointed an agent for service of process and registered in New York, consenting to jurisdiction, do not pose the same

needs for maritime attachment." Pet. App. 15a. Rather, in such circumstances, the Second Circuit continued, "there are generally any number of means to prosecute a civil claim and, upon receiving judgment, collect on that claim." *Id.*

This reference to "any number of means to … collect on that claim" is nothing but a nostrum, since in many cases, a maritime defendant has no property or other assets except for a stream of electronic funds transfers, which cannot be restrained except by resort to the unique remedy of maritime attachment. (See POINT I, *supra*). Moreover, through its off-handed dismissal of the need for security in light of the jurisdiction obtained through registration, the Second Circuit has improperly favored one purpose of maritime attachment (obtaining jurisdiction over a maritime defendant) over the other purpose (obtaining security).

Through its disregard of the useful and necessary role played by maritime attachment in modern admiralty practice, the Second Circuit's decision below and in *STX Panocean* has betrayed maritime plaintiffs worldwide, and is thereby in stark contrast with this Court's declared allegiance and deference towards the historical practice.

B. There is a Conflict With the Principle Favoring Uniformity and Harmony in the Application of Federal Maritime Law

This Court has long held that permitting state law to control, or even influence, the meaning of

terms used is a maritime procedural rule is forbidden by the Constitution. U.S. CONST. art. III, § 1, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3.

The Constitution, in establishing a basis for maritime jurisdiction, "took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920). The purpose of the Framers in doing so, was "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government…." *Id.* In other words, the intent was "to place the entire subject -- its substantive as well as its procedural features -- under national control because of its intimate relation to navigation and to interstate and foreign commerce." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

Throughout its history, this Court has continued to reaffirm this principle. As early as 1875, this Court stated that it was "unquestionable" that the Constitution's extension of federal judicial power "to all Cases of admiralty and maritime Jurisdiction":

> … must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the

> intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). This principle was re-affirmed by this Court in *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994), and again most recently in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004).

See also S. Pac. Co. v. Jensen, 244 U.S. 205 (1917) (rejecting New York State workers' compensation statute as impairing the uniformity of maritime law); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918) (declining to permit a seaman to apply state law providing for greater damages in his personal injury action against his employer); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (refusing to apply New York's Statute of Frauds to seaman's breach of contract claim, since federal law, supreme by virtue of U.S. CONST. art. VI, carried with it the implication that wherever a maritime interest was involved, that interest displaced a local interest no matter how significant); and s*ee generally*, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 n. 10 (1942) (noting that "[i]n many other cases this Court has

declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law"), and *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 (1996) (observing that "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law") (both collecting cases).

Accordingly, under the long-standing principles outlined by this Court, state legislation is invalid if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *S. Pac. Co.*, 244 U.S. at 216. *See also* Edwin D. Dickinson & William S. Andrews, Jr., *A Decade of Admiralty in the Supreme Court of the United States*, 36 CALIF. L. REV. 169 (1948) (describing the uniformity requirement as an elliptical description of the maritime laws' essential insulation from the diverse and parochial tendencies of the local laws of the several states.)

There can be no question that maritime attachment is one of the characteristic features of maritime law, like arrest, salvage, general average, and personification of the vessel. *See*, *e.g.*, *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 391 (3rd Cir. 2002) ("the area of maritime attachments [is] a subject of particular concern to the federal courts, and one where national uniformity is of some

importance.")

There also can be no question that the application of state corporate registration statutes works a material prejudice to the characteristic features of this maritime remedy, since it provides a loophole for defendants to escape the effects of maritime attachment contrary to its historical purposes. Therefore, it is clear that such state statutes must yield to this venerable aspect of maritime procedure.

The failure to maintain uniformity invites inconsistent results which subvert the "traditional commercial maritime interests' need for decisional stability." Michael F. Vitt, *Stemming the Tide: Uniformity in Admiralty Law*, 28 U. BALT. L. REV. 423, 444 (1999). Commentators have noted that national rules in the form of the general maritime law are necessary "to subject an industry to a single standard when the imposition of multiple standards would make it commercially burdensome for maritime commerce to operate efficiently." Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1482 (2001). "Confusion and inefficiency will inevitably result if more than one body of law governs" the parties' rights. *Norfolk Southern Ry.*, 543 U.S. at 29. "[L]eaving the functional usefulness of Rule B attachments to the vagaries of the laws of the fifty states would create a measure of anarchy … inconsistent with an ancient purpose of admiralty law … [and] detrimental to international commerce." *Aurora Maritime Co. v. Abdullah Mohamed Fahem &*

Co., 85 F.3d 44, 48-49 (2d Cir. 1996).

Thus, the Constitution and the concomitant uniformity doctrine require that the Federal courts fashion a uniform maritime rule, not resort to state law. For example, state property rights have been held to yield to the rights granted by maritime law. *See*, *e.g.*, *Aurora Maritime*, 85 F.3d at 47 (bank's state-law right of set-off was inferior and had to yield to maritime plaintiff's right to security under Rule B); *In Re Sterling Nav. Co., Ltd. v. Sterling Nav. Co. Ltd. A/S*, 31 B.R. 619 (S.D.N.Y. 1983) (reversing bankruptcy court's award and holding that shipowner had enforceable lien even though it was not filed in accordance with UCC Article 9 because maritime liens were independent of UCC and have priority over trustee's lien in bankruptcy).

The Supremacy Clause, U.S. CONST. art. VI, grants Congress the power to preempt state legislative and common law. *See*, *e.g.*, *Pub. Utils. Comm'n of State of California v. United States*, 355 U.S. 534, 544 (1958). When Congress authorized the Supreme Court to develop admiralty rules in 1792, it reiterated the peculiar nature of maritime law and instructed the Supreme Court to adhere to rules and usages of admiralty rather than those of the common law courts. *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 908 (4th Cir. 1981). It has been held that "Rule B is a sterling example of the Court's respect for that advice." *Schiffahartsgesellschaft*, 732 F.2d at 1547.

Furthermore, Rule B was promulgated by this Court under the authority of the Rules Enabling Act of 1934 which specifically granted this Court the power "to prescribe, by general rules, for the district courts of the United States … the practice and procedure in civil actions at law" and provides that "thereafter all laws in conflict therewith shall be of no further force or effect." Thus, this statute contains a direct and unambiguous preemption clause, under which any state legislation which conflicts with or restricts federal procedural rules prescribed by this Court is rendered ineffective.

The Admiralty Rules, including Rule B, are therefore a necessary feature of the federal procedural rules adopted pursuant to the Rules Enabling Act of 1934, and to the extent that Rule B conflicts with state law, such as New York's Business Corporation Law § 1304, the latter can be of no force or effect.

New York's Business Corporation Law § 1304 is in direct conflict with Rule B because it acts to prohibit the federal courts from exercising powers conferred on them by Rule B. First, it prohibits the court from issuing attachments against defendant who are amenable to the jurisdiction of the court but not actually present in the district. Impairing a federal court's procedural powers in this fashion is impermissible:

As this Court explained in *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965): "[t]o hold that a Federal

Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." Such a topsy-turvy result is especially pernicious in admiralty, where the rules occupy a distinctively important role in the federal procedural system.

This unique stature of the Supplemental Rules arises from maritime commerce's international character and the mobility of vessels, so that "the [maritime] creditor … may more often be the one in need of special protections." *Trans-Asiatic Oil*, 743 F.2d at 961. Such special circumstances make it all the more inappropriate to superimpose state law to decide the reach and functioning of the Supplemental Rules.

Congress has preempted state law that would impair the effectiveness of federal procedural rules. "The legacy of admiralty's legal heritage is the deep rooted historical basis surrounding its procedural rules." *Schiffahartsgesellschaft*, 732 F.2d at 1547. The distinctively federal character of the Supplemental Rules makes it all the more important to accord them preemptive effect over any state law that would impair their operation. *See generally* Lizabeth L. Burrell, *SYMPOSIUM: Federalism and Uniformity in Maritime Law: Application of State Law to Maritime Claims: Is There a Better Guide Than Southern Pacific Co. v. Jensen?*, 21 TUL. MAR.

L. J. 53 (1996) (strongly urging in favor of uniformity and cataloging the dangers of reliance on state law in the place of federal general maritime law.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 2009

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